

<sup>1</sup> This post-award proceeding was handled by Judge Klein after the retirement of Judge Clark. The case has now been transferred to Judge Ali N. Marchant.

claimant for appointments with the authorized treating physician.

The respondent requests review of the Post-Award Medical Order arguing the ALJ exceeded his jurisdiction and authority in granting the benefits. Respondent asserts the ALJ's Order is in error as he exceeded his jurisdiction in allowing the medical record from the physician assistant into the record without her testimony and in finding claimant did not have reliable transportation or the ability to drive to Kansas City from Wichita. Finally, respondent argues claimant has failed to meet her burden of proving she is entitled to "furnished" transportation as opposed to reimbursement for mileage. Respondent requests the Order be reversed.

Claimant argues the Order of the ALJ should be affirmed.

#### **FINDINGS OF FACT**

This proceeding involves three docketed claims. In Docket No. 1,012,597, claimant alleged injuries to her upper back, neck and right upper extremity as the result of an accident occurring in mid-September 2002 and each and every working day thereafter. In Docket No. 1,012,598, claimant alleged injury to her low back as the result of an accident occurring on approximately September 5, 2002, and each and every working day thereafter. Finally, in Docket No. 1,037,657, claimant alleged injury to her low back with referred pain as the result of an August 10, 2007, accident.

Docket Nos. 1,012,597 and 1,012,598 were settled by running award on May 2, 2005, with claimant's right to future medical treatment left open for future determination. Docket No. 1,037,657 has not proceeded to final award.

This case was originally before ALJ John D. Clark. Before his retirement, Judge Clark held a Post-Award hearing on April 1, 2014, under Docket No. 1,037,657 on the question of transportation to authorized medical physician visits. Judge Clark ordered respondent to furnish transportation to claimant for her appointments with the authorized treating physician. Respondent appealed to the Board arguing Judge Clark exceeded his jurisdiction and authority in granting the benefits. Claimant argued the Order of the ALJ should be affirmed. The Board vacated the Order and dismissed the appeal because Docket No. 1,037,657 had yet to go to a final award. Therefore, any post-award order would exceed the ALJ's jurisdiction and authority, and would be premature.

ALJ Thomas Klein took over the appeal after the retirement of Judge Clark. On August 11, 2014, ALJ Klein held another post-award hearing under Dockets 1,012,597 & 1,012,598. There appears to be no written record of the August 11, 2014, hearing and no written submission letters or stipulations to the judge in this record from that hearing.

Judge Klein entered a Post-Award Order on August 11, 2014, in Dockets 1,012,597 & 1,012,598 authorizing transportation for claimant's appointments with the authorized physician.

Respondent appealed under 1,037,657 on August 14, 2014, and then filed an amended application under 1,012,597 & 1,012,598 on August 18, 2014, arguing the ALJ exceeded his jurisdiction in awarding claimant transportation. Claimant argues the Order should be affirmed.

Respondent's brief indicates the parties agreed at the August 11, 2014, hearing to incorporate by reference all of the testimony from the April 1, 2014, hearing. In a joint e-mail, the parties have acknowledged same. As such, the Board will consider the transcript dated April 1, 2014. The inclusion of Claimant's Exhibit No. 1, from the April 1, 2014, hearing remains at issue.

Dr. Bailey of Kansas City is claimant's authorized treating physician. Claimant lives in Wichita. Respondent originally provided claimant with transportation to Dr. Bailey until respondent began working with a third party administrator who discontinued claimant's transportation and opted to pay medical mileage instead. Claimant objected, alleging she has difficulty traveling from Wichita to Kansas City as the result of nerve damage in her right leg and pain in her hip and low back, making it difficult for her to sit. Claimant also testified nerve damage in her right arm makes it difficult for her to grip and turn the steering wheel.

Claimant also argued she does not have reliable transportation to make the trip to and from Dr. Bailey's office in Kansas City. She testified her car is 12 years old and she barely trusts it to get her around Wichita. Claimant's personal vehicle is a 2002 Lexus ES 300, with 90,000 miles. Claimant testified she can't afford to have it repaired.

Claimant has been diagnosed with PoTS, which is postural orthostatic tachycardia syndrome. She is receiving treatment, but it affects her ability to work some days. Claimant has been advised to avoid driving long distances. Additionally, due to her PoTS claimant has sensitivity to sunlight and sound and has trouble breathing when she starts to feel sick or gets thirsty. The PoTS is not related to claimant's work injuries. Claimant has not been restricted from driving as the result of her workers compensation claim.

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 44-519 Furse 2000 states:

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

Over respondent's objection, the ALJ admitted the report of physician assistant Lahna Elliott PA-C, dated March 31, 2014. The ALJ ruled that, as this was not a medical doctor, the report was admissible. However, as noted above, the statute speaks of health care providers, not just medical doctors. The restrictions of the statute appear to apply to a physician assistant equally. Therefore, respondent's objection to the letter of PA Elliott was proper and the admissibility of the report was error on the ALJ's part. The Board finds the report of PA Elliott violates the provisions of K.S.A. 44-519 and is excluded from this record.

K.A.R. 51-9-11 states:

(a) It shall be the duty of the employer to provide transportation to obtain medical services to and from the home of the injured employee whether those services are outside the community in which the employee resides or within the community.

(b) The employer shall reimburse the worker for the reasonable cost of transportation under the following conditions:

(1) if an injured worker does not have a vehicle or reasonable access to a vehicle of a family member living in the worker's home; or

(2) if the worker, because of the worker's physical condition, cannot drive and must therefore hire transportation to obtain medical treatment. Reimbursement may include, among other things, reimbursement for the cost of taxi service, other public transportation, and ambulance service, if required by a physician, and for the cost of hiring another individual to drive the worker for medical treatment. Any charges presented to the employer or insurance carrier for payment shall be a fair and reasonable amount based on the customary charges for those services.

(c) If an injured worker drives that worker's own vehicle or drives, or is driven in, a vehicle of a family member living in the home of the worker, and if any round trip exceeds five miles, the respondent and insurance carrier shall reimburse the worker for an amount comparable to the mileage expenses provided in K.S.A. 44-515.

(d) In any dispute in regard to charges for mileage expenses, and on application by any party to the proceedings, the reasonable cost of transportation shall be

determined by a hearing before a workers compensation administrative law judge. (Authorized by K.S.A. 44-573; implementing K.S.A. 1996 Supp. 44-510, as amended by L. 1997, Ch. 125, Sec. 4; effective May 1, 1980; amended May 1, 1983; amended May 22, 1998.)

The Post-Award Medical Order merely reiterates the specific language of the above administrative regulation. The furnishing of transportation provision is not explained. However, the language of the regulation appears to contemplate reimbursement for the cost of transportation, in the case of a worker who does not have a vehicle or reasonable access to a vehicle, or who, because of his or her physical condition, cannot drive to the medical appointment.

Claimant's testimony supports her contention that she cannot, due to her physical condition, drive to the medical appointments. Therefore, as respondent has refused to provide transportation, claimant may obtain any reasonable form of transportation and submit the charges to respondent for reimbursement. The regulation considers several options for claimant to chose, including a taxi, public transportation, and the cost of hiring another individual to drive her to the medical appointments. These options present the possibility of a rather expensive trip. However, as respondent has refused to provide transportation, the choice would appear to fall to claimant.

The Board does not find the Order of the ALJ violates the regulation. It merely fails to clearly explain what type of transportation claimant is to use. It will be the responsibility of the court to determine the appropriateness of claimant's transportation choice once the hearing regarding the reasonableness of claimant's transportation choice comes before the ALJ.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Post-Award Medical Order of the ALJ remains in full force and effect. The determination as to the reasonableness of claimant's transportation method remains to be decided.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Post-Award Medical Order of Administrative Law Judge Thomas Klein dated August 11, 2014, remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2014.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant  
fdesk@ksworkcomplaw.com  
larry@ksworkcomplaw.com

Karl L. Wenger, Attorney for Respondent and its Insurance Carrier  
mvpkc@mvplaw.com  
kwenger@mvplaw.com

Thomas Klein, Administrative Law Judge

Ali N. Marchant, Administrative Law Judge